751.

SUPREME COURT OF THE UNITED STATES.

No. 159.

MORGAN McAFEE, PLAINTIFF IN ERROR,

vs.

THOMAS C. DOREMUS, JAMES SUYDAM, CORNELIUS R. SUYDAM AND JOHN NIXON.

IN ERROR TO THE DISTRICT COURT U. S. FOR MISSISSIPPI.

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J. & G. S. GIDEON, printers.

UNITED STATES OF AMERICA, *ss:*

To Thomas C. Doremus, James Suydam, Cornelius R. Suydam, and John Nixon, merchants and partners in trade, under the firm and style of Doremus, Suydams & Nixon, or Shattuck, Baine & Topp, their attorneys of record, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in January next, pursuant to a writ of error filed in the office of the clerk of the district court of the United States for the northern district of Mississippi, wherein Morgan McAfee is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel J. Gholson, judge of the said district court of the United States for the northern district of Mississippi, this 20th day of June, in the year of our Lord 1844.

S. J. GHOLSON.

Executed on plaintiff's attorney, Nov. 25th, 1844.

A. K. McCLUNG, *Marshal.*

Marshal's fees—Ent., ex., and ret.,		$4 50
Mileage	-	75 00
		$79 50

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judge of the district court of the United States for the northern district of Mississippi, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said district court before you, between Thomas C. Doremus, James Suydam, Cornelius R. Suydam, and John Nixon, merchants and partners in trade, under the firm and style of Doremus, Suydams & Nixon, plaintiffs, and Morgan McAfee, defendant, a manifest error hath happened, to the great damage of the said Morgan McAfee, as by his complaint appears. And it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday in January next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to

be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, the second Monday of January, A. D. 1844, and of the independence of the United States the 68th.

[SEAL.]

Issued the 20th day of June, 1844.

G. M. RAGSDALE, *Clerk*.

Filed in my office this 20th June, 1844.

G. M. RAGSDALE, *Clerk*.

Exemplification.

DOREMUS, SUYDAMS & NIXON,
vs.
CLYMER, POLK & Co, (drawers) } 129.
and
MORGAN MCAFEE, (endorser)

Pleas had at a district court of the United States for the northern district of Mississippi, began and held at the town of Pontotoc, in said district, on the first Monday of June, 1842. Present, the honorable Samuel Gholson, judge of said court.

Be it remembered, that on the 28th day of May, 1842, Thomas C. Doremus, James Suydam, Cornelius R. Suydam, and John Nixon, then citizens of the State of New York, sued out of the office of the clerk of the district court of the United States for the northern district of Mississippi, their certain summons in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern district of Mississippi, ss:

The President of the United States, to the marshal of the northern district of Mississippi, greeting:

We command you, without delay, to summon Isaac Clymer, Benjamin C. Polk, William C. Ivins, and Hiram Clymer, late merchants and partners in trade, under the firm and style of Clymer, Polk & Co., makers, and Morgan McAfee, endorser, all citizens of the State of Mississippi, and resident in the northern district aforesaid, that they be and appear before the district court of the United States, to be held at the town of Pontotoc, in and for the northern district of Mississippi, on the first Monday in June next, to answer to Thomas C. Doremus, James Suydam, Cornelius R. Suydam, and John Nixon, merchants and partners in trade, under the firm and style of Doremus, Suydams & Nixon, citizens of the State of New York, of a plea of trespass on the case, to the damage of the plaintiffs of six thousand dollars, and that they do file their plea or defence with the clerk of said court, on or before the meeting of the same, or judgment will be given against them by default; and have then there this writ.

Witness the honorable Samuel J. Gholson, judge of the district court

of the United States for the northern district of Mississippi, at Pontotoc, the first Monday of December, A. D. 1841, and in the 66th year of the independence of the United States.

Issued May 28th, 1842.

G. M. RAGSDALE, *Clerk.*

Which summons is endorsed as follows, to wit:

"This action of assumpsit is founded on a bill of exchange, made by the defendants, Clymer, Polk & Co., to the defendant, Morgan McAfee, for the sum of $4,000, dated Dec. 8th, 1839, and due ninety days after date, addressed to Messrs. Keys & Roberts, of New Orleans, endorsed by the said Morgan McAfee to the plaintiffs. Said bill of exchange was protested for non payment. The amount of said bill of exchange, with the interest, damages, and costs, is the sum actually demanded. Bail is not required.

SHATTUCK, BAINE & TOPP,
Plaintiffs' att'ys."

Upon which said summons, the marshal made the following special deputation and return, to wit:

"I hereby appoint and constitute Sam. W. Carr my special deputy to execute the within writ and make due return on same. Given under my hand [and] seal this 30th day of May, 1842.

ALEX. K. McCLUNG, [SEAL.]
Marshal no. dis't Miss'i."

"Rec'd and executed May 30, 1842, on the def'ts, Morgan McAfee and Benj. C. Polke. The other def'ts are not found.

ALEX. K. McCLUNG, *Mar. N. D. M.*,
By SAM. W. CARR, *S. D.*"

And the said plaintiffs, by attorney, filed, at the time of issuing said summons, their declaration, in the words and figures following, to wit:

"THE UNITED STATES OF AMERICA,
Northern district of Mississippi:

United States district court for the northern district of Mississippi. To June term, A. D. 1842.

Thomas C. Doremus, James Suydam, Cornelius R. Suydam, and John Nixon, merchants and partners in trade, under the firm and style of Doremus, Suydams & Nixon, citizens of the State of New York, by attorney, complain of Isaac Clymer, Benjamin C. Polke, Williams C. Ivins, and Hiram Clymer, late merchants and partners in trade, under the firm and style of Clymer, Polke & Co., (makers,) and Morgan McAfee, (endorser,) all citizens of the State of Mississippi, and resident in the northern district thereof, who are summoned to answer, &c., of a plea of trespass on the case upon promises. For that whereas heretofore, to wit, on the 8th day of December, 1839, at Locopolis, Miss., to wit, in the northern district aforesaid, the said defendants, Isaac Clymer, Benjamin C. Polke, William C. Ivins, and Hiram Clymer, by their

partnership names and style of Clymer, Polke & Co., made their certain bill of exchange of that date, and then and there addressed the same to Messrs. Keys & Roberts, New Orleans, and thereby requested them, ninety days after the date thereof, being the first of exchange, (second of the same tenor and date unpaid,) to pay to the order of Morgan McAfee four thousand dollars, for value received; and the said defendants, Clymer, Polke & Co., then and there delivered the said bill of exchange to the said defendant, Morgan McAfee, who afterwards, to wit, on the day of , and before the payment of the said sum of money therein mentioned, or any part thereof, was made, endorsed and delivered the said bill of exchange to the said plaintiffs. And the said plaintiffs aver, that afterwards, to wit, on the day when the said bill of exchange became due and payable, the same was duly presented and shown to the said Keys & Roberts for payment thereof, and payment thereof was then and there, to wit, in the city of New Orleans, demanded of the said Keys & Roberts. But they wholly refused to pay the same, or any part thereof, and the said bill of exchange was then and there protested for non payment; of all which, the defendants had due notice. By means whereof, and by virtue of the statute in such case made and provided, the said defendants became liable to pay the said sum of money specified, according to the tenor and effect thereof; and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day of , undertook, and then and there faithfully promised to pay the same to the said plaintiffs on request.

2d count. And whereas, also, afterwards, to wit, on the 8th day of December, 1839, (written Dec'r 8th, 1839,) the said defendants, Isaac Clymer, Benjamin C. Polke, William C. Ivins, and Hiram Clymer, to wit, at Locopolis, Miss., to wit, in the northern district aforesaid, by their partnership names and style of Clymer, Polke & Co., according to the usage and custom of merchants, made their certain bill of exchange in writing, bearing date the day and year last aforesaid, and then and there directed the said bill of exchange to Messrs. Keys & Roberts, New Orleans, to wit, (in the State of Louisiana); by which said bill of exchange, they, said defendants, Clymer, Polk & Co., then and there requested the said Keys & Roberts, ninety days after date, to pay to the order of Morgan McAfee, four thousand dollars, value received, and then and there delivered the said bill of exchange to the said Morgan McAfee; and the said Morgan McAfee, before the payment of the said sum of money, in the said bill of exchange specified, or any part thereof, afterwards, to wit, on the day of , to wit, in the northern district aforesaid, endorsed and delivered the said bill of exchange to the said plaintiffs. And the said plaintiffs aver, that afterwards, to wit, on the day the said bill of exchange became due and payable, the same was duly presented and shown to the said Keys & Roberts, at New Orleans, for payment thereof; and the said Keys & Roberts had sight thereof, and payment of the said sum of money, in said bill of exchange mentioned, was then and there demanded; but the said Keys & Roberts did not, nor would at the time when the said bill of exchange was so pre-

"DOREMUS, SUYDAMS & NIXON
vs.
CLYMER, POLKE & Co., & MORGAN MCAFEE. } 129.

Wednesday, December the 14th, 1842. It is ordered by the court that an alias summons issue for all the defendants, except Benjamin C. Polke and Morgan McAfee, who were served with process, and that this cause be continued."

Pursuant to which said order of court an alias summons was issued in the words and figures following, to wit:

"UNITED STATES OF AMERICA,
Northern district of Mississippi, ss:

The President of the United States to the marshal of the northern district of Mississippi, greeting:

We command you, without delay, to summon Isaac Clymer, Benjamin C. Polke, Williams C. Ivins, and Hiram Clymer, late merchants and partners in trade, under the firm and style of Clymer, Polke & Co., makers, and Morgan McAfee, endorser, all citizens of the State of Mississippi, and resident in the northern district aforesaid, that they be and appear before the district court of the United States to be held in the town of Pontotoc, in and for the northern district of Mississippi, on the first Monday of December next, to answer to Thomas C. Doremus, James Suydam, Cornelius R. Suydam and John Nixon, merchants and partners in trade, under the firm and style of Doremus, Suydams & Nixon, citizens of the State of New York, of a plea of trespass on the case, to the damage of the plaintiffs of six thousand dollars; and that they do file their plea or defence with the clerk of said court, on or before the meeting of the same, or judgment will be given against them by default; and have then [and] there this writ.

Witness the honorable Samuel J. Gholson, judge of the district court of the United States, for the northern district of Mississippi, at Pontotoc, the first Monday of June, A. D. 1842, and in the 66th year of the independence of the United States. Issued 13th August, 1842.

G. M. RAGSDALE, *Clerk.*"

Which said alias summons is indorsed as follows, to wit:

"This action of assumpsit is founded on a bill of exchange, made by the defendants, Clymer, Polke & Co., to the defendant, Morgan McAfee, for the sum of $4,000, dated December 8th, 1839, and due ninety days after date, addressed to Messrs. Keys & Roberts, of New Orleans, endorsed by the said Morgan McAfee to the plaintiffs. Said bill of exchange was protested for non-payment. The amount of said bill of exchange, with the interest, damages and costs, is the sum actually demanded. Bail is not required.

SHATTUCK, BAINE & TOPP,
Plaintiff's attorneys.

"The former writ was executed on Benj. C. Polke and Morgan McAfee. Other defendants not found. G. M. RAGSDALE, *Clerk.*"

Upon which said alias summons the marshal made the following special deputation and return, to wit:

"Came to hand, 23d day of September, 1842. I, Alex'r K. McClung, marshal northern district of Mississippi, do hereby appoint Edmund Jenkins, esquire, my special deputy, to execute, and due return to make, of the within precept.

"Given under my hand and seal, this 27th day of October, 1842.

ALEX'R K. McCLUNG, [SEAL.]
Marshal No. Dist. Miss."

The within writ, duly executed on Isaac Clymer and William C. Ivins, by handing copies in person. Hiram Clymer not found. Executed 2d November, 1842.

ALEX. K. McCLUNG,
Marshal.
By EDM'D JENKINS,
Special Deputy Marshal."

At December term, 1842, the following order was made, to wit:

"Doremus, Suydams & Nixon,
vs.
Clymer, Polke & Co., and Morgan McAfee. } 129.

Wednesday, Dec'r the 14th, 1842.—It is ordered by the court that this cause be continued until next term."

And afterwards, to wit, on the 17th day of June, 1843, being a day of the June term, 1843, of said court, the following proceedings were had in said cause, to wit:

"Doremus, Suydams & Nixon,
vs.
Clymer, Polke & Co., and Morgan McAfee. } 129.

Saturday, June the 17th, 1843.—This day came the parties by their attorneys, and the plaintiffs say they will no further prosecute this suit as to defendants Clymer, Polke & Co. Whereupon, it is ordered by the court that this cause be continued as to defendant, Morgan McAfee, upon his affidavit filed therefor."

Also afterwards, to wit, on the 8th day of December, 1843, being a day of the December term of said court, the further proceedings were had in said cause, as follows, to wit:

"Doremus, Suydams & Nixon,
vs.
Morgan McAfee. } 129.

Friday, December the 8th, 1843.—This day came the parties by their attorneys, and then came a jury of good and lawful men, to wit, jury No. 3; being John Abbott and eleven others; who were elected, tried, and sworn well and truly to try the issue joined. Whereupon, by consent of the parties, it is ordered by the court that Robert Farrow, one of

said jurors, be withdrawn, and that this cause be continued until the next term of this court."

And also afterwards, to wit, on the 8th day of June, A. D. 1844, being a day of the June term of said court, the following proceedings were had in the aforesaid cause, to wit:

"Doremus, Suydams & Nixon,
vs.
Morgan McAfee. } 129.

Saturday, June the 8th, 1844.—This day came the parties by their attorneys, and thereupon came a jury of good and lawful men, to wit, jury No. 1; being John L. Allen and eleven others; who, being elected, tried, and sworn well and truly to try the issue joined between the parties, upon their oaths do say, that they find the issue in favor of the plaintiffs, and assess their damages, by reason of the non-performance of the promise and assumption in the declaration mentioned, to the sum of five thousand three hundred and fifty-seven dollars and fifty cents. It is therefore considered by the court that the plaintiffs recover of said defendant, McAfee, the sum aforesaid by the jury assessed, and also the cost in this cause expended.

The defendant, by attorney, then filed his bill of exceptions, (marked No. 1,) in the words and figures following, to wit:

"Doremus, Suydams & Nixon,
vs.
Clymer, Polk & Co., and
Morgan McAfee. } 129.

DISTRICT COURT, U. S.,
Northern district, No. dist. *Miss.*

Be it remembered, that, on the trial of this cause, on this 8th day of June, 1844, the plaintiffs in this case offered in evidence a bill of exchange in these words:

$4,000. "LOCOPOLIS, Miss., *Dec. 8th*, 1839.

Ninety days after date of this my first of exchange, (second of same tenor and date unpaid,) pay to the order of Morgan McAfee, four thousand dollars, value received, and charge the same to account of your obd't servants. CLYMER, POLK & Co.

Messrs. KEYS & ROBERTS, New Orleans."

Having endorsed thereon the following names, three of which were erased:

"Pay to Doremus, Suydams & Nixon, or order. Morgan McAfee, Charleston P. O., Miss."

"A. H. Davidson, Charleston P. O., Miss.; G. Davidson, Charleston P. O., Miss.; M. L. Cooper & Co."

The plaintiff then proved that the names of A. H. Davidson and G. Davidson had been erased before the maturity of the bill. The plaintiff then offered in evidence the copy of the original protest, accompanied by the deposition of the notary public, in these words:

UNITED STATES OF AMERICA,
Eastern district of Louisiana, city of New Orleans, ss:

Be it remembered, that on this thirteenth day of May, in the year of our Lord one thousand eight hundred and forty-four, before me, M. M. Cohen, a commissioner duly appointed on the 19th April, 1842, by the circuit court of the United States, in and for the eastern district of Louisiana, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1842, and the act of Congress, entitled "An act in addition to an act, entitled an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, personally appeared H. B. Cenas, a person of sound mind and lawful age, a witness for the plaintiff in civil suit now depending in the district court of the United States, in and for the northern district of Mississippi, wherein Doremus, Suydams & Nixon are plaintiffs, and Clymer, Polk & Co. (drawers) and Morgan McAfee (endorser) are defendants; and the said A. B. Cenas being by me first carefully examined, and cautioned, and sworn to testify the whole truth, and nothing but the truth, did depose and say, that he is a notary public, duly commissioned and sworn in and for the city and parish of New Orleans, State of Louisiana; that he held said office on the tenth day of March, A. D. 1840, on which day, at the request of the Commercial Bank of New Orleans, holder of the original draft, of which the following is a copy, to wit:

$4,000. LOCOPOLIS, *Miss., Dec'r 8th*, 1839.

Ninety days after date of this my first of exchange, (second of same tenor and date unpaid,) pay to the order of Morgan McAfee four thousand dollars, value received, and charge the same to account of your obedient servants,

CLYMER, POLK & Co.

Messrs. KEYS & ROBERTS,
New Orleans.

Endorsed: MORGAN McAFEE, *Charleston P. O.*
Mess. M. D. COOPER & Co.

He, the said notary, presented said draft to a clerk of the drawees at their counting room, (said drawees not being in,) and demanded payment thereof, and was answered that the same could not be paid; whereupon he, the said notary, did publicly and solemnly protest said draft for non-payment, and of protest did give notice to Clymer, Polk & Co., drawers, and to Morgan McAfee, endorser, and M. D. Cooper & Co., endorsers, by letters to the drawer and first endorser severally written and addressed, informing them of said protest, and that the holders looked to them for payment; which letters he the said notary did direct to the said drawers and said first endorsers, respectively, as follows: the one for

Clymer, Polk & Co., drawers, to them at Locopolis, Miss., and that for the said Morgan McAfee, the first endorser, to him at Charleston P. O., Miss., (and by delivering that for the last endorsers to themselves.) Which letters he the said notary did put into the post office at New Orleans aforesaid, on the day and date of said protest. All of which was done under the hand of said notary, and recorded in presence of competent witnesses, and in due form of law.

The notary's fees for said protest and notices amounted to $3 50.

The "document A, M. M. Cohen, U. S. C., is sworn to by me,

H. B. CENAS, *Not. Pub.*"

"UNITED STATES OF AMERICA,

Ninth circuit and eastern district of La.,

city of New Orleans, ss:

I, M. M. Cohen, a commissioner duly appointed on the 19th April, 1842, by the circuit court of the United States for the ninth circuit and eastern district of Louisiana, under and by virtue of the acts of Congress, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,' passed February 20th, 1812, and the act of Congress, entitled 'An act in addition to an act entitled 'An act for the more convenient taking of affidadavits and bail in civil causes depending in the courts of the United States,'' passed March 1st, 1817, and the act entitled, 'An act to establish the judicial courts of the United States,' passed September 24th, 1789, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, that the witness lives in New Orleans, State of Louisiana, more than one hundred miles from Pontotoc, State of Mississippi, the place of trial of the cause for and in which said deposition is taken and is necessary. I further certify, that no notification was made out and served on the defendants, or adverse parties, their agent, or attorney, to be present at the taking of the deposition, and to put interrogatories, if he or they might think fit, and that no notification of the time and place of taking the said deposition was made out and served on said defendants or adverse parties, because neither the said adverse parties, nor any attorney or agent of said adverse parties, was, at the time of taking said deposition, within (100) one hundred miles of the said city of New Orleans, the place of taking the said deposition. I further certify, that on this thirteenth day of May, A. D. 1844, I was by the witness, who is of sound mind and lawful age, and the witness was by me carefully examined and cautioned, and sworn to testify the whole truth, and the deposition was by me reduced to writing in the presence of the witness; and after carefully reading the same to the witness, he subscribed the same in my presence.

I have retained the said deposition in my possession, for the purpose of sealing up, directing, and forwarding the same with my own hands to the court for which the same was taken.

I further certify, that I am not of counsel or attorney to either of the parties in said deposition and caption named, or in any way interested in the event of the said civil cause named in the caption.

In testimony whereof, I have hereunto set my hand and seal, the words "are plaintiffs" being first interlined on page 1 ante.

M. M. COHEN, [L. S.]

U. S. commissioner circuit and district court U. S. for the ninth circuit and eastern district of Louisiana.

Commissioner's fee $10 00
Notary for copy annexed 2 50 } Paid by plaintiffs.

M. M. COHEN, *U. S. C.*"

"UNITED STATES OF AMERICA, *State of Louisiana:*

By this public instrument of protest be it known, that on this tenth day of March, in the year one thousand eight hundred and forty, at the request of the Commercial Bank of New Orleans, holder of the original draft, whereof a true copy is on the reverse hereof written, I, Hilary Breton Cenas, a notary public in and for the city and parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, presented said draft to a clerk of the drawees at their counting room, (said drawees not being in,) and demanded payment thereof, and was answered that the same could not be paid. Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said draft, as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interests, suffered or to be suffered, for want of payment of the said draft. Thus done and protested in the presence of Law. Dornan and Ernest Granet, witnesses.

In testimony whereof, I grant these presents under my signature, and [L. S.] the impress of my seal of office, at the city of New Orleans, on the day and year first above written.

H. B. CENAS, *Notary public.*

Original signed—LAW. DORNAN,
E. GRANET."

"$4,000. LOCOPOLIS, *Miss.*, *Dec'r 8th*, 1839.

Ninety days after date, of this my first of exchange, (second of same tenor and date unpaid,) pay to the order of Morgan McAfee four thousand dollars, value received, and charge the same to account [of] your obedient servants,

CLYMER, POLK & Co.

Messrs. KEYS & ROBERTS,
New Orleans."

Endorsed—Morgan McAfee, Charleston P. O., Miss.; M. D. Cooper & Co.

I, the undersigned notary, do hereby certify that the parties to the draft, whereof a true copy is embodied in the accompanying act of protest, have been duly notified of the protest thereof by letters to them by me written and addressed, dated on the day of said protest, and served on them respectively this day, in the manner following, viz: by depositing those for the drawers and first endorsers in the post office in this city

on the same day as this protest, directed to them respectively as follows: that for the drawers to them at Locopolis, Miss.; and that for the first endorser to him at Charleston P. O., Miss.; and by delivering that for the last endorsers to themselves.

In faith whereof, I hereunto sign my name, together with Law. Dornan and Ernest Granet, witnesses, at New Orleans, this 11th day of March, eighteen hundred and forty.

Original signed Lawr. Dornan, E. Grant.

H. B. CENAS, *Not. Pub.*

"I certify the foregoing to be a true copy of the original protest, draft, and memorandum of the manner in which the notices were served on file and of record in my office.

In faith whereof I grant these presents, under my signature and the impress of my seal of office, at New Orleans, on this ninth day [L. S.] of November, in the year of our Lord one thousand eight hundred and forty-three.

H. B. CENAS. *Not. Pub.*"

Sworn to before me,

M. M. COHEN, *U. S. C.*

To the introduction of which copy the defendant by counsel objected, but such objection was overruled by the court, and said copy allowed to be read; to which opinion of the court the defendant excepted, and this his bill of exceptions, before the jury retired from the box, was signed and sealed by the court, and ordered to be made a part of the record.

S. J. GHOLSON, [SEAL.]

And afterwards, to wit, on the 10th day of June, 1844, being a day of the June term of said court, the following motion was entered, to wit:

DOREMUS, SUYDAMS & NIXON
vs.
CLYMER, POLK & Co.

In the district court U. S. northern district of Miss.

Motion to arrest the judgment in this case, because the plaintiffs at a former term of the court dismissed their suit as to Clymer, Polk & Co., drawers of the bill of exchange sued on. 10 June, 1844.

GHOLSON.

TOPP & HARRIS.

And also, afterwards, to wit, on the 11th day of June, 1844, being a day of the June term of said court, the further proceedings were had in the aforesaid cause, to wit:

DOREMUS, SUYDAMS & NIXON
vs.
MORGAN MCAFEE. 129.

Tuesday, June the 11th, 1844.

This day came the parties by their attorneys, and then came on to be

heard defendants' motion in arrest of judgment, and after argument, it is considered by the court that the same be overruled. Whereupon, the defendant by attorney tendered his bill of exceptions, which was signed and sealed by the court, and ordered to be made a part of the record in this cause.

Which said bill of exceptions (marked No. 2,) is in the words and figures following, to wit:

DOREMUS, SUYDAMS & NIXON
vs.
CLYMER, POLK & CO., & MORGAN MCAFEE.

In the district court of the United States for the northern district of Mississippi.

Be it remembered, that on this *tenth* day of June, A. D. 1844, in the said district court then sitting, came on to be heard the motion of the defendant Morgan McAfee, to arrest and set aside the judgment rendered against him in this case in said court, on the 8th day of June, A. D. 1844, and said defendant showed, from the records of said court, that on the day of June, A. D. 1839, the following was made and entered as a rule of said court:

"Rule XXX. The practice and proceedings in actions at law, by the laws of this State, and the rules of practice for the government of the courts of law, made by the late Supreme Court, where not incompatible with the laws of the United States, the rules which may be prescribed by the Supreme Court of the United States for the government of this court, or with the existing rules of this court, shall be considered the rules and practice of this court: Provided however, and it is hereby expressly understood, that this rule does not adopt the whole of the act entitled 'an act to amend the laws respecting suits to be brought against endorsers of promissory notes,' approved May 13th, 1837; but that all of said act, except the 10th section thereof, is, and it is intended to be, adopted."

And that the act referred to in said rule is as follows:

"Section 1. Be it enacted by the legislature of the State of Mississippi, that in all actions founded upon bills of exchange and promissory notes, the plaintiff shall be compelled to sue the drawers and endorsers living and resident in this State, in a joint action; and such suit shall be commenced in the county where the drawer or drawers reside if living in the State; and if the drawer or drawers be dead, or reside out of the State, the suit shall be brought in the county where the first endorser resides.

Sec. 2. Be it further enacted, that in all cases where any drawer, acceptor, or endorser, shall have died before the commencement of the suit, a separate action may be brought against the representatives of such drawers, endorsers and *exceptors*.

Sec. 3. Be it further enacted, that the court shall receive the plea of non assumpsit and no other, as a defence to the merits, in all suits brought in pursuance of this act; and all matters of defence may be given in evidence under the said plea. And it shall be lawful for the

jury to render a verdict against part of the defendants, and in favor of the others, if the evidence before them require such a verdict, and the court shall enter up the proper judgment in such verdicts against the defendants; which judgments and verdicts shall not be reversed, annulled, or set aside for want of form.

Sec. 4. Be it further enacted, that new trials shall alone be granted to such defendants as the verdicts may have been wrongfully rendered against; and judgments shall be entered against all the other defendants in pursuance of the verdict.

Sec. 5. Be it further enacted, that the clerk shall issue duplicate writs to the several counties where the various defendants may reside, and shall endorse on all executions the names of the drawers and endorsers, particularly specifying the first, second and third endorsers.

Sec. 6. Be it further enacted, that it shall be the duty of the sheriff, in all cases, to make the money on the executions, out of the drawer or drawers, acceptor or acceptors; and in no case shall a levy be made on the property of any security or securities, endorser or endorsers, unless an affidavit from some credible person be made and filed among the papers in the cause, setting forth that the principal or principals have no property in this State, out of which the plaintiff's money and costs can be made; and in such event the plaintiff may proceed with the executions against the defendants next liable, and so on until his executions be satisfied.

Sec. 7. Be it further enacted, that no sheriff, or other officer, shall take more than one forthcoming bond, in any case, for the same cause of action.

Sec. 8. Be it further enacted, that any plaintiff shall have the right to discontinue his suit against any one or more of the endorsers or securities, that he may sue in any joint action, before verdict, on payment of the costs that may have accrued by joining said defendant in such suit.

Sec. 9. Be it further enacted, that in all suits brought under the provisions of this act, the defendants shall not be allowed to sever in their pleas to the merits of the action, and no plea of abatement shall be allowed to be filed in any cause, unless affidavit be made of the truths of the facts plead in the plea of abatement.

Sec. 10. Be it further enacted, that if any plaintiff or plaintiffs shall cause to be levied an execution on any security or their endorsers, or their property, when the principal has sufficient property in this State to satisfy such execution, the party so offending shall be deemed a trespasser, and shall be liable to an action from the party aggrieved, and exemplary damages shall, in all such cases, be awarded by the jury trying the same. Approved, May 13, 1837."

And the said defendant also showed from the return of the marshal, that the process in this case was duly served on three of the partners of the firm of Clymer, Polk & Co., to wit, Isaac Clymer, William C. Ivins, and Benjamin C. Polk, and that on the day of June, 1843, the said suit was dismissed as to the said Clymer, Polk & Co., the drawers of the bill of exchange sued on. And the said motion having been

argued, and the court being of opinion that said reasons are not sufficient to sustain said motion, overrules the same; to which opinion of the court the said defendant excepts, and this his bill of exceptions is signed and sealed by the court, and ordered to be made a part of the record in this cause.

S. J. GHOLSON, [SEAL.]

The following is a copy of the bond for writ of error, to wit:

"UNITED STATES OF AMERICA,
Northern district of Mississippi, sct:

Know all men by these presents, that we, Morgan McAfee, Jesse McAfee, and Madison McAfee, are held and firmly bound unto Doremus, Suydams & Nixon, in the just and full sum of ten thousand seven hundred and fifteen dollars, lawful money of the United States, to be paid to the said Doremus, Suydams & Nixon, or their lawful attorney, executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the seventeenth day of June, A. D. one thousand eight hundred and forty-four.

The condition of the above obligation is such, that whereas at a term of the district court of the United States for the northern district of Mississippi, commenced and held in the town of Pontotoc, on the first Monday of June, A. D. 1844, judgment was rendered by the said court in favor of said Doremus, Suydams & Nixon, against the said Morgan McAfee, for the sum of five thousand three hundred and fifty-seven dollars and fifty cents, and costs of suit; and the said Morgan McAfee hath sued out a writ of error from the Supreme Court of the United States, to reverse said judgment: Now, if the said Morgan McAfee shall prosecute his said writ of erro to effect, and shall well and truly pay and satisfy the amount of said judgment, and all such damages, costs, and interest as the said Supreme Court of the United States shall adjudge in the premises, if he, the said Morgan McAfee, shall fail to make his plea good, then and in that case, this obligation is to be void, otherwise to remain in full force and virtue.

MORGAN McAFEE, [SEAL.]
JESSE McAFEE, [SEAL.]
MADISON McAFEE, [SEAL.]

Sealed and delivered in presence of
FOSTER H. THOMPSON.
Com. in chancery.

Which said bond has the following endorsements thereon, to wit:

"I, F. H. Thompson, com. in chancery, do certify, that the within named securities are responsible men, and good for amount of this bond.
FOSTER H. THOMPSON.
Com. in chancery."